
Proposed Findings of Fact Issued on Tribal Request

Lac du Flambeau Band of Lake Superior Chippewa Indians
Lac du Flambeau, Wisconsin June 2007

Contacts

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27):

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EPA Indian policy

Under the U.S. Constitution and its
own Indian policy, EPA works with
federally recognized tribal
governments as sovereign entities
and not as political subdivisions of
states or local governments.

For more details about EPA's Indian
policy you can visit:
www.epa.gov/indian/1984.htm.

U.S. Environmental Protection Agency Region 5 is seeking comments on a document called a "proposed findings of fact" that was recently issued for an American Indian tribe in Wisconsin. The Lac du Flambeau Band of Lake Superior Chippewa is requesting authority under the Clean Water Act to set its own water quality standards on its Northern Wisconsin reservation. The proposed findings of fact document describes facts EPA can rely on as it considers the tribe's request for legal authority called "treatment in the same manner as a state" or TAS. The Agency will probably rule on the TAS application later this year. If that request is approved, the tribe will be able to make another application to EPA for approval of specific water quality standards for surface waters within the reservation.

The Clean Water Act authorizes EPA to treat tribes in the same way as states for implementing water quality standards within reservation boundaries if they meet certain requirements. Generally speaking, as sovereign governments tribes already have authority over their own members and territories. But tribes seeking to apply their authority over the water-related activities of nonmembers must show how the actual or potential impact of those actions affect the political integrity, economic security or health and welfare of the tribe. This test was established by the U.S. Supreme Court in a 1981 case *Montana v. United States* 450 U.S. 544. The Lac du Flambeau Band is asking EPA for authority to set water quality standards over all surface waters in its reservation, so EPA is providing public notice of the proposed findings of fact. EPA will use this document to decide if the tribe has met the requirements of *Montana v. United States*.

The proposed findings of fact includes details describing actual or potential effects on water quality inside the reservation from various activities. Those activities include commercial and residential development in natural areas and shorelines, wetlands filling, cranberry production, logging, and sand and gravel mining. Currently no federally approved water quality standards exist for the LDF reservation. Wisconsin's federally approved water quality standards do not apply to waters within the Lac du Flambeau reservation.

The full proposed findings of fact document can be read at the Minocqua Public Library, 415 Menominee St., Minocqua, Wis.; Wisconsin Department of Natural Resources offices in Madison; and at the band's Natural Resources Department, 2500 Highway 47N, Lac du Flambeau, Wis. It can also be found on the Web at: www.epa.gov/region5/water/wqs5/wqstribes.htm After reading the document, people wishing to comment on the proposed findings of fact should send their statements to WDNR between June 15 and July 27. The state agency may incorporate them into its official response to EPA about the tribe's application to run its own water program.

The proposed findings of fact document is not EPA's final decision on the tribe's request for TAS but is one more step in the process. Between December 2005 and February 2006, EPA accepted state and public comments on the tribe's TAS application. A public meeting was held in February 2006. Numerous comments have been received, and EPA will be responding to all comments at the time it makes a final decision on the tribe's TAS request. If the TAS is approved, the tribe must then submit another application to EPA for approval of its water quality standards.

Questions and answers

This part of the fact sheet provides answers to frequently asked questions about the issues, rules and regulations relating to tribal applications for authority under the Clean Water Act:

Who is the applicant?

The Lac du Flambeau Band of Lake Superior Chippewa is a federally recognized Indian tribe. The LDF reservation covers 87,000 acres and was established by a treaty between the tribe and U.S. in 1854. The tribe has approximately 3,000 members, making it the third most populous Indian reservation in Wisconsin.

What Clean Water Act programs is the tribe applying for with this application?

LDF is seeking eligibility for two programs -- water quality standards (*CWA Section 303(c)*) and certification (*CWA Section 401*). Additionally, before the tribe's water quality standards can take effect under the Clean Water Act, the tribe would need to develop its standards through a separate public notice and comment process, submit them to EPA and receive Agency approval. To read the text of the Clean Water Act and related regulations, go to www.epa.gov/epahome/lawregs.htm.

What requirements must a tribe meet in order to obtain approval of a TAS application?

In 1987, Congress amended the Clean Water Act by adding Section 518 to address the role of tribes. Section 518 provides a method for tribes to be treated in the same manner as states for certain CWA programs. Section 518(e) describes the criteria a tribe must meet in order to be eligible for TAS. EPA published regulations in *40 Code of Federal Regulations § 131.8* that describe the process and requirements for TAS approval. (*See Web site listed above to read 40 CFR*) To have its water quality program approved a tribe must show that it:

- is federally recognized by the Secretary of Interior;
- has a governing body carrying out substantial governmental duties and powers over a reservation;
- is proposing to carry out water quality functions that pertain to the management and protection of water resources within a

reservation and has authority to regulate water quality; and

- is reasonably expected to be capable of carrying out the functions of an effective water quality program.

What public participation opportunities are available for TAS applications?

Under federal regulations, EPA provides notice to states and other tribes of a tribe's assertion of authority so these entities can make comments. Comments are limited to the tribe's assertion of authority. EPA also provides notice to local governments and the public, whose comments must be submitted through the appropriate government agency. In this case Wisconsin DNR is accepting comments.

When EPA issues a proposed findings of fact document, it provides similar opportunities for comment.

What does it mean if a tribe receives TAS for water quality standards and 401 certification under the Clean Water Act?

Once EPA approves a tribe's eligibility, or TAS, for a particular program under the CWA, the tribe can normally administer that program as a state would. TAS status is limited to the specific program covered by EPA's decision. This means when a tribe submits a TAS application requesting Clean Water Act authority, EPA's approval of the application would apply only to those programs listed in the application and only to the reservation waters for which the tribe seeks approval.

Is EPA's approval of a TAS application the same as approval of tribal water quality standards?

No. Treatment in the same manner as a state approval is a separate process from EPA approval of tribal water quality standards. TAS makes a tribe eligible to administer a water quality program. A tribe with TAS must then obtain EPA approval of its water quality standards before those standards take effect. States must go through a similar process with their standards.

Water quality standards consist of designated uses for water bodies, water quality criteria to protect those uses and an "antidegradation" policy to maintain and protect water quality. Additionally, under section 401 of the CWA, states or tribes with federally approved water quality standards also have the authority to evaluate whether a discharge under certain federal upstream permits would be consistent with their water quality standards. They can then decide whether to grant, deny, or condition a water quality certification under Section 401 of the CWA for such permits.

What is the process for development and EPA review of tribal water quality standards?

Like states, all tribes with TAS must follow the procedures for developing EPA-approved standards. Those procedures are in *40 CFR §131.20*. A tribe would

develop proposed standards, make them available to the public, hold a public hearing regarding the proposed standards, and submit them to EPA for approval within 30 days of adopting the standards. A tribe with TAS that has previously developed and adopted water quality standards under tribal law may use this process to seek EPA approval for its existing standards or a set of modified standards that meet Clean Water Act requirements. A tribe could also choose to develop new standards and seek EPA approval of those. But in every case, a tribe with TAS must obtain EPA's okay, following the same process a state must go through, before the standards take effect.

Will the public be able to comment on the tribe's water quality standards?

Yes. Under EPA regulations and following its own laws, the tribe is required to make the water quality standards and technical documents available for review before holding a public hearing. The tribe would evaluate the public's comments, adopt any appropriate revisions, and then submit the water quality standards to EPA for approval.

Are state and tribal water quality standards expected to be compatible?

EPA regulations require a state or tribe ensure its water quality standards provide for the attainment and maintenance of the standards in downstream waters. (*See 40 C.F.R. § 131.10*). To the extent differences do exist between state and tribal standards, both entities may work together to resolve the issues on a case-by-case basis just as neighboring states do with each other. EPA regulations also provide for a mechanism to settle disputes between states and tribes when the difference in water standards on common streams, rivers and lakes results in unreasonable consequences.

Once a tribe has received treatment as a state approval for CWA Sections 303(c) and 401, can it issue National Pollutant Discharge Elimination System permits?

No. NPDES is the permit system EPA uses to control and manage pollution discharges into streams, rivers and lakes. The tribe's TAS for water quality standards applies only to the authority to establish standards under Section 303(c) of the Clean Water Act for reservation waters covered by the application. A tribe with TAS approval can also issue water quality certifications under Section 401 of the CWA for federal permits and licenses for activities that discharge to those waters.

A tribe must qualify for TAS status for each provision of the CWA or environmental program that it seeks to implement. An NPDES permit issued by EPA would need to contain any limits necessary to meet the Agency-approved tribal water quality standards. For a discharge upstream of the reservation, an NPDES permit must include conditions that ensure compliance with the

applicable water quality requirements of the downstream waters covered by a TAS approval. (*See 40 C.F.R. § 122.4(d); 40 C.F.R. §§ 122.44(d)(3) and (4).*)

Does TAS approval give a tribe enforcement authority for water quality standards?

No. EPA's approval of a tribe's treated as a state application does not provide any enforcement authority under the Clean Water Act. Water quality standards help protect and improve water quality but do not impose enforceable requirements on any party. They do serve as a basis for specific control actions, such as effluent limitations in permits, that are enforceable. EPA retains enforcement authority under the CWA unless and until a tribe is approved to implement a federal permitting program. If a tribe chooses to establish any regulations or enforcement measures to enforce the standards, it must do so under the tribe's inherent authority as a sovereign government.

A tribe's water quality standards would serve as benchmarks when EPA issues NPDES permits to facilities or when the U.S. Army Corps of Engineers issues Section 404 permits for wetlands. EPA or the Corps is responsible for both issuing and enforcing these permits that would include any conditions based on a tribe's Section 401 certification.


Can a tribe with TAS approval prepare Section 401 water quality certifications?

A tribe becomes the authorized agency to prepare water quality certifications for federal permits and licenses and other activities that may result in any discharge to the reservation waters covered by the TAS approval. TAS approval also means a tribe, like a state, can issue certifications conducted under Section 401 of the Clean Water Act. A tribe could evaluate whether a discharge under a federal license or permit would be consistent with its water quality standards and decide whether to grant, deny, or condition a water quality certification under Section 401 of the CWA.

In summary, a federally-issued NPDES or Section 404 permit for a facility or activity discharging into reservation waters covered by the TAS approval could not be issued without a tribal CWA Section 401 certification or waiver. The Clean Water Act also provides a tribe with TAS with a formal role in commenting on federal licenses or permits for discharges upstream or adjacent to tribal waters.

EPA Releases Proposed Findings of Fact Document In Lac du Flambeau Application

Public Can Comment
Through Wisconsin
Department of Natural Resources
(details inside)

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**LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS:
Proposed Findings of Fact Issued**

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